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Contracts

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CONTRACTS

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INTRODUCTION

Within the survey period, the Sixth Circuit Court of Appeals reviewed three cases in which the recurring issue of the proper measure of damages in a breach of contract action was the focal point of the decision. The three areas of law at issue were: (1) speculative and uncertain damages; (2) limitation of remedies and consequential damages under the Uniform Commercial Code; and (3) *quantum meruit* recovery in the absence of an enforceable contract.

Three additional cases decided during the survey period involved contract issues. The Sixth Circuit examined two troublesome contract areas: application of statute of limitations provisions in breach of warranty actions and application of the parol evidence rule. In a third case the court analyzed the effect of a breach in one contract of a series, on the performance obligations of the nonbreaching party in the remaining contracts.

I. THE MEASURE OF DAMAGES

A. Speculative and Uncertain Damages

In *Booker v. Ralston Purina Co.*,[1] the Sixth Circuit Court of Appeals, applying Tennessee law in a diversity action, affirmed the district court's holding that damages were limited to the royalties owed plaintiff, Booker, for the sale of 268 cases of a frozen entree product. Plaintiff appealed the damage award arguing that the judge erred in limiting the damage remedy to the cases of frozen food actually sold. The breach of contract stemmed from the defendant's failure to test-market and mass-market, as promised, a frozen food product developed by the plaintiff. Under such circumstances, damages based upon cases actually sold did not fairly

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1. 699 F.2d 334 (6th Cir. 1983).

compensate the plaintiff. As a result, plaintiff sought damages based upon one of four alternative methods: a preconceived contract value, prospective profits on the marketing of the new product, lost opportunity, or a reasonable rental value for use of plaintiff's idea. The Sixth Circuit rejected all four methods as being too speculative and uncertain.[2]

The Sixth Circuit specifically denied recovery based on a lump-sum payment for "what both parties may have felt was an accurate value figure."[3] The court noted that plaintiff had an opportunity to take a lump-sum payment at the inception of the contract. He chose instead to receive royalties, based on the number of cases of the product actually sold, as compensation for defendant's use of plaintiff's innovative and untried product. Plaintiff gambled that royalty payments over a period of years would be more profitable than the outright sale of his idea for a set price. Plaintiff freely negotiated the remuneration term of the agreement, accordingly, the court was unwilling to rewrite the term.[4]

Plaintiff's second method for measuring damages involved a calculation of prospective profits lost as a result of defendant's failure to proceed with the testing and marketing. Here, the Sixth Circuit was faced with evaluating plaintiff's loss in light of the conservative approach Tennessee courts have taken with respect to prospective profit loss resulting from a breach of contract.[5] The old rule that lost profits are not recoverable due to the speculative nature of the remedy has been frequently rejected and replaced by a "reasonable certainty" standard.[6] Jurisdictions differ, however, in their application of the "reasonable certainty" standard[7] and Ten-

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2. *Id.* at 335.
3. *Id.* at 336.
4. *Id.*
5. *See, e.g.,* Maple Manor Hotel, Inc. v. Metropolitan Gov't of Nashville, 543 S.W.2d 593 (Tenn. App. 1975)(lost profits denied where apartment complex had not been completed); Anderson—Gregory Co. v. Lea, 51 Tenn. App. 612, 370 S.W.2d 934 (1963)(lost profits denied where plaintiff had never conducted dredging operations and showed no ascertainable method of evaluating future profits). *But see* Ferrell v. Elrod, 63 Tenn. App. 129, 469 S.W.2d 678 (1971)(lost profits in a new business recoverable where shown with reasonable certainty by actual experience subsequent to the breach).
6. *See, e.g.,* Fera v. Village Plaza, Inc., 396 Mich. 639, 242 N.W.2d 372 (1976); Continental Plants Corp. v. Measured Mktg. Serv., Inc., 274 Or. 621, 547 P.2d 1368 (1976); CertainTeed Prod. Corp. v. Goslee Roofing & Sheet Metal, Inc., 26 Md. App. 452, 339 A.2d 302 (1975).
7. The requirement of certainty is a significant limitation on the awarding of contract

nessee falls on the more conservative end of the spectrum. The rule requiring a reasonable degree of certainty in the proof is not a rule preventing the recovery of profits or other damages, but rather a rule requiring the presentation of evidence to afford a reasonable basis for awarding the damages, aside from sympathy and feelings alone.[8]

Thus, the question on appeal was whether the plaintiff's proofs established with reasonable certainty the projected lost profits. Plaintiff argued that the lost profits could be calculated from defendant's various projections, formulated at the onset of the contract and used as a basis for determining the propriety of entering the contract.[9] In evaluating these proofs, the Sixth Circuit reasoned that the untried and highly innovative product was similar to a new business. Although damages may be established with the aid of expert testimony, economic and financial data, market surveys and analyses (as in this case), or business records of similar enterprises,[10] Tennessee case law has consistently rejected recovery based on future profits of a new business.[11] In applying Tennessee law, it is not surprising that the Sixth Circuit agreed with the district court's judgment that lost profits were too speculative and uncertain to sustain a damage award. Similarly, the court summarily rejected the arguments for increased damages based upon a lost opportunity or rental value.[12]

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damages. *See* Griffin v. Colver, 16 N.Y. 489 (1858)(the leading New York case in which the doctrine was formulated). Contemporary cases require only reasonable certainty: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979).

What is meant by "certainty" or "reasonable certainty" is unclear. The standard requires "that the quality of the evidence must be of a higher caliber than is needed to establish most other factual issues in a lawsuit." J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS 529 (1977) (CALAMARI & PERRILLO).

8. 5 CORBIN ON CONTRACTS, §§ 1020, 1022 (1964).

9. 699 F.2d at 336. Booker and Ralston conducted extensive negotiations before agreeing on a marketing contract based on royalties. Before entering into the agreement, Ralston conducted marketing projections which indicated that Booker's product looked potentially profitable. *Id.* at 335.

10. RESTATEMENT (SECOND) OF CONTRACTS § 352 comments (1979).

11. 699 F.2d at 336 n.3.

12. Lost opportunity and rental value are treated as alternative methods of recovery when an aggrieved party cannot establish lost profits with sufficient certainty. CALAMARI & PERRILLO, *supra* note 7, at 532 and 535; E. ALLAN FARNSWORTH, CONTRACTS 887 (1982).

The lost opportunity alternative appears applicable when evaluated with the rationale set forth by the treatise writers. CALAMARI & PERRILLO, *supra* note 7, at 534. However, the

As previously stated, "reasonable certainty" refers to the quality of proof presented. Although courts almost uniformly use this language, the stringency of its application varies from one jurisdiction to the next. Some courts arbitrarily prohibit a new business from recovering for lost profits.[13] A more realistic and accurate approach is that a new business faces a greater burden of proof.[14] The conservative nature of the Tennessee approach, applied by the Sixth Circuit in this case, is further illustrated by a 1977 case denying a lost profits recovery to an ongoing business where past sales could be compared.[15]

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instant facts do not fit within the limitation imposed by the RESTATEMENT OF CONTRACTS § 332 and RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1979). Both sections limit application of the alternative remedy to aleatory promises. The rental value alternative is applied where the breach of contract is one that has delayed or prevented the use of the property. Cases where this alternative has been approved include defective machinery rendering the property inoperative and delayed completion of construction resulting in unoccupied property. It should be noted that "since rental value depends on what the property would command on the market and that, in term, depends on the profits may result in uncertainty as to rental value." FARNSWORTH, *supra*, at 887.

RESTATEMENT (SECOND) OF CONTRACTS § 348 (1979) provides:

> (1) If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.
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> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
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> > (a) the diminution in the market price of the property caused by the breach, or
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> > (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.
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> (3) If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

Id.

13. Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (1955).

14. Handi Caddy v. American Home Prods. Corp., 557 F.2d 136 (8th Cir. 1977).

15. Joy Floral Co. v. South Cent. Bell Tel. Co., 563 S.W.2d 190 (Tenn. App. 1977)(lost profits denied for alleged decrease in sales resulting from telephone company's failure to list plaintiff's main office in the white pages). *Cf.* Fera v. Village Plaza, Inc., 396 Mich. 639, 242 N.W.2d 372 (1976). Fera recovered lost profits where extensive evidence was admitted at trial regarding the issue of the reasonable certainty of the lost profits resulting from a breach of a business lease. The Michigan Supreme Court, reversing the Michigan Court of Appeals, held that, although plaintiff's endeavor was a new business, lost profits were not precluded by the reasonable certainty standard. The court emphasized that the rule is one of sufficiency of proof and that mathematical precision is not required. Rather the nature of

On the other end of the spectrum is the case of *Lee v. Seagram & Sons, Inc.*[16] In *Lee,* the former half owners in a wholesale liquor distributorship were awarded damages based on lost profits from a new distributorship which they never owned. Defendant was found in breach of an oral promise to relocate plaintiff in the new distributorship as consideration for the sale of the old distributorship. After considering other evidentiary and contract issues, the Second Circuit Court of Appeals affirmed a lost profits damage remedy of $407,850. At trial, a certified public accountant presented evidence that estimated the lost profits from the never acquired new distributorship by the profits of plaintiff's old distributorship, even though the new distributorship was never identified. The court held that the award of damages was not too speculative or uncertain.[17] Since the defendant's breach caused the difficulty in proving damages, the defendant bore the risk of uncertainty created by its own conduct.[18] Although probably a minority position, other courts have approved establishing prospective lost profits by comparison with those of similar businesses.[19]

As noted above, the *Booker* case represents a conservative approach to the measure of damages in a breach of contract action. The approach, limiting recovery to actual sales with no recovery for lost profits or lost opportunity, appears to be at odds with the principle that "a man should not profit by his own wrong."[20] The basic premise that "the aim in awarding damages is to put the injured party in as good a position as full performance would have put him"[21] supports a more liberalized test of reasonable certainty.

Doubt should be resolved against the party in breach.[22] How-

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the circumstances, particularly where defendant's breach caused the imprecision, is determinative in applying the reasonable certainty standard. *Id. See also* Upjohn Co. v. Rachelle Laboratories, Inc., 661 F.2d 1105, 1113-14 (6th Cir. 1981)(absolute certainty is not required under *Fera*); The Vogue v. Shopping Centers, Inc., 402 Mich. 546, 226 N.W.2d 148, *on remand*, 86 Mich. App. 110, 272 N.W.2d 205 (1978)(applied the *Fera* analysis).

16. 552 F.2d 447 (2d Cir. 1977), *amended on other grounds*, 592 F.2d 39 (2d Cir. 1979).

17. 552 F.2d at 455.

18. *Id. See also* Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946).

19. Leoni v. Bemis Co., 255 N.W.2d 824 (Minn. 1977)(profits lost by nationwide business when breach of contract prevented it from expanding to California were shown by comparison with its profits in other states).

20. *See* Kaufman, 12 ST. MARY'S L.J. 77, 89 (1980).

21. Kaufman, CORBIN ON CONTRACTS, § 992, at 142 (1982 Supp., Part 2).

22. Doubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to

ever, until more jurisdictions follow the Second Circuit's rationale in the *Lee* case, this commentator recommends the use of liquidated damage clauses in contracts involving new businesses or products. With a reasonable liquidated damage provision the non-breaching party is compensated without having to establish, with certainty, the loss suffered.

B. Limitation of Remedies and Consequential Damages under the Uniform Commercial Code

The case of *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable and Cold Storage Co.*,[23] required construction and application of the Uniform Commercial Code (U.C.C.) provisions regarding the limitation of buyer's remedies. Specifically, the issue presented was whether an exclusion of a consequential damages clause may be given effect where a limited remedy provision has failed of its essential purpose.

The *Lewis* case arose out of a written agreement providing for the sale of a freezer. The agreement contained express warranties and remedy provisions limited to repair, replacement or rescission. The printed portion of the contract included an exclusion of consequential damages clause.[24] Sawyer failed to pay the balance due on the contract when Lewis was unable to promptly repair the freezer to meet performance warranties. Lewis sued for the contract price and Sawyer counterclaimed asserting breach of contract, breach of warranty and misrepresentation. At trial, a jury awarded Sawyer $25,823 in lost profits and $27,080 in excess Freon costs.

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profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstnces of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of facts. RESTATEMENT (SECOND) OF CONTRACTS § 352, comments (1979).

23. 709 F.2d 427 (6th Cir. 1983).

24. The facts with reference to the terms of the contract are confusingly stated. Pages 7-12 of the contract contained standard printed terms; pages 2-7 were typewritten. 709 F.2d at 428. The printed portion of the contract contained the remedy limitation provisions. The printed portion also contained the exclusion of consequential damages provision despite the incorrect reference to "handwritten" at page 428. *See* 709 F.2d at 435 n.18. The typewritten portion of the contract contained the warranty provisions that: (1) the freezer was capable of processing six thousand pounds of various fruits per hour; (2) the freezer would use no more than 1.8 liquid pounds of Freon per 100 pounds of frozen products; and (3) for a period of time seller would supply the Freon that the freezer consumed over the warranty period.

Lewis raised three commercial law issues on appeal which focused on an application of the Washington version[25] of U.C.C. sections 2-714[26] and 2-719.[27] First, Lewis challenged the jury's award of lost profits in light of the repair and rescission limitations ex-

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25. The agreement provided that Washington law would govern. MICH. COMP. LAWS § 440.1105 (1967) permits such a choice. Therefore, the Sixth Circuit correctly looked to Washington statutory law for guidance.

26. U.C.C. § 2-714 (1978) dealing with buyers damages in a breach of warranty actions provides:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
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> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) *In a proper case any incidental and consequential damages under the next section may also be recovered.*

Id. (emphasis added). The Washington version is identical. W.R.C. 62 A. 2-714 (1974).

27. U.C.C. § 2-719 (1978) providing for modification or limitation of Code remedies states:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
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> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
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> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
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> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Subsection (3) of the Washington statute is non-uniform and provides:

> (3) Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or non-conforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.
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> Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

W.R.C. 62 A 2-719(3) (1974).

pressed in the contract. The Sixth Circuit determined that although remedy limitations are permissible under the U.C.C.,[28] a jury could have reasonably found that the remedy limitations in the Lewis-Sawyer contract failed of their essential purpose and, therefore, the general remedy provisions under the U.C.C. were applicable.

Buyers frequently resort to section 2-719(2), advancing the argument that an exclusive or limited contractual remedy has failed of its essential purpose.[29] This is particularly true in cases where the exclusive remedy is limited to repair or replacement,[30] a typical commercial contract provision. The difficult question for courts is the factual determination of what is required for such a remedy to "fail of its essential purpose." The U.C.C. Official Comments (Comments) provide that "an apparently fair and reasonble" limitation clause "must give way to the general remedy provisions" of Article 2 when the clause "operates to deprive either party of the substantial value of the bargain."[31] The buyer is said to be deprived of the substantial value of the bargain where the seller fails to timely or successfully perform the repair obligation.[32]

The instant case is illustrative. The Sixth Circuit found that sufficient evidence was presented to permit a reasonble jury to conclude that the repair limitation failed when Lewis was unable to

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28. U.C.C. § 2-719(1)(1978), *supra* note 26, consistent with the U.C.C. philosophy of freedom of contract, permits parties to devise specialized remedies to meet the particular requirements and risk allocations of the individual contract.

29. For numerous cases, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 466-469 (1980); Eddy, *"Essential" Purposes of Limited Remedies*, 65 CAL. L. REV. 28 (1977); ANDERSEN, *"Failure of Essential Purpose and Essential Failure on Purpose,"* 31 SW. L.J. 759 (1977).

30. Eddy, *supra* note 29, at 85; WHITE & SUMMERS, *supra* note 29, at 469.

31. U.C.C. § 2-719 comment 1 (1978).

32. The court in Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973) held as follows:

> The purpose of an exclusive remedy of replacement or repair of defective parts, the presence of which constitute a breach of an express warranty, is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct or consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered . . . . The limited, exclusive remedy fails of its purpose and is thus avoided under § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period.

Id. at 426.

fully repair the freezer;[33] and that the rescission limitation failed when the circumstances made it "exceedingly impractical to carry out the essence of an agreed-upon remedy."[34] Relevant to the rescission limitation, evidence was presented at trial to support a finding that Lewis deliberately concealed the freezer's inability to meet cherry processing warranties.[35] Accordingly, it was reasonable to conclude that Sawyer, having made other business commitments, would have been severely disadvantaged financially by a contract rescission. Therefore, the essentail purpose of the rescission limitation failed.[36]

Although the Sixth Circuit's application of the "exceedingly impractical" standard to U.C.C. section 2-719(2) may differ from tests defined in other circuits,[37] the *Lewis* court had to apply a test to the exceptional case where an alleged latent defect prevented rescission and not merely repair.[38] Rescission, as a limited alternative to an exclusive repair or replace clause, is extremely unsatisfactory where a substantial period of time has lapsed, the goods have not been repaired, and the buyer had suffered consequential damages while awaiting cure.[39]

Upon resolving the remedy limitation issue in favor of aggrieved buyer, Sawyer, the Sixth Circuit was then required to determine

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33. *See* Chatlos Sys., Inc. v. National Cash Reg. Corp., 635 F.2d 1081 (3d Cir. 1980). In *Chatlos*, the Third Circuit recognized that "courts generally have concluded that so long as the buyer has the use of substantially defect-free goods, the limitation should be given effect. But when the seller is either unwilling or unable to confrom the goods to the contract, the remedy does not suffice." *Id.* at 1085, citing Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971) as an example.

34. 709 F.2d at 431.

35. *Id.* at 432.

36. *Id.*

37. *See, e.g.*, Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1063 (5th Cir. 1982)(the test in determining whether a limited warranty fails of its essential purpose is whether seller can provide buyer with conforming goods within a reasonable time); Marr Enter. v. Lewis Refrigeration Co., 556 F.2d 951 (9th Cir. 1977)(the Ninth Circuit recognized both a latent defect test and seller's inability or unwillingness to cure test); Chatlos v. National Cash Reg. Corp., 635 F.2d 1081 (3rd Cir. 1980)(the Third Circuit recognized the seller's inability or unwillingness to cure test).

38. 709 F.2d at 432.

39. One court held such a limitation to be unconscionable where the manufacturer knew the product's effectiveness was questionable and the purchaser suffered excessive foreseeable consequential damages for crop failure. Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20 (D. Ala. 1975). For another case where a rescission or refund remedy failed of its essential purpose, see Earl M. Jorgenson Co. v. Mark Constr., Inc., 56 Hawaii 466, 540 P.2d 978 (1975).

the second issue: whether U.C.C. section 2-714(2) prevented the award of consequential damages. Lewis argued that section 2-714(2) limited buyer's remedy to benefit of the bargain damages. The Sixth Circuit, however, correctly decided that consequential damages are permissible under section 2-714(3)[40] and section 2-715(2)[41] provided that they are foreseeable and cannot be mitigated by cover. Thus, the Sixth Circuit again resolved the issue in favor of Sawyer.

The third commercial law issue called for an application of U.C.C. section 2-719(3), which specifically authorizes the exclusion of consequential damages in a sale of commercial goods unless it is established that the limitation is unconscionable.[42] The question presented was whether the failure of an exclusive remedy provision under section 2-719(2), triggering Article 2 remedies, prohibited application of an exclusion of consequential damages provision.

This recurring issue had plagued courts and resulted in a split in authority.[43] One view prohibits application of the exclusionary clause based upon the unambiguous language of section 2-719(2). The language "remedy may be had as provided in this Act" includes the remedy of consequential damages[44] under section 2-715.[45] Another view, and the one followed in this case, provides

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40. *See supra* note 25.

41. U.C.C. § 2-715 (1978) provides:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include
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> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

The Washington version is identical. W.R.C. 62A. 2-715 (1974).

42. On the other hand, consequential damages are prima facie unconscionable as applied to consumer goods. U.C.C. § 2-719(3). *See* 709 F.2d at 434 n.8. See *supra* note 26 for the Washington version of unconscionability and consumer goods.

43. Eddy, *supra* note 29, at 84.

44. *See, e.g.*, Fargo Machine & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 21 U.C.C. 80 (E.D. Mich. 1977); Morris v. Chevrolet Motor Div. of General Motors Corp., 39 Cal. App. 3d 917, 114 Cal. Rptr. 747, 14 U.C.C. 1294 (1974); Adams v. J. I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1, 7 U.C.C. 1270 (1970).

45. U.C.C. § 2-715(2)(1978), *supra* note 41.

that the separate clause excluding consequential damages stands or falls independently of the limited remedy provision which failed of its essential purpose.[46] Under this analysis the question is whether the exclusion of consequential damages is unconscionable.[47] One commentator maintains that focusing upon unconscionability allows a distinction to be drawn between willful behavior and simple inability to perform.[48] In some jurisdictions a different rule applies depending upon whether the contractual provisions excluding liability for consequential damages accomplish the exclusion directly by specific provision or indirectly by relegating the buyer's recourse to an exclusive remedy.[49]

In the instant case, the printed portion of the contract excluded

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46. 709 F.2d at 435. *See, e.g.*, Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262, 22 U.C.C. 407 (D. Me. 1977); Stutts v. Green Ford, Inc., 47 N.C.App. 503, 267 S.E.2d 919 (1980).

47. A consequential damage exclusion is ineffective only if unconscionable, wholly apart from whether or not an exclusive remedy has failed of its essential purpose. Kohlenberger, Inc. v. Tyson's Foods, Inc., 256 Ark. 584, 510 S.W.2d 555 (1974). The question of conscionability is decided by the court:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
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> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. U.C.C. § 2-302 (1978).

The Washington version is uniform. *See* W.R.C. 62A. 2-302 (1974).

48. Eddy, *supra* note 29, at 91. Professor Eddy justifies differentiating between willful behavior and inability because "[n]early all of the cases in a commercial setting that do allow recovery of consequential damages involve such a willful failure to perform the repair obligation." *Id. But see* American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976), where the court upheld the provision in the contract excluding consequential damages despite seller's willful refusal to honor the repair or replacement obligation.

49. *See Beal, supra* note 32. The case appears to stand for the proposition that consequential damages are recoverable whenever an exclusive remedy fails of its essential purpose. It should be noted, however, that in *Beal* there may not have been a separate provision in the contract excluding liability for consequential damages. Accordingly, the court's holding may result from the absence of a clause excluding consequential damages. Accordingly, the court's holding may result from the absence of a clause excluding consequential damages. For another contract containing no separate clause excluding consequential damages, see Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649, 5 U.C.C. Rep. Serv. 1219 (W.D. Pa. 1968), *aff'd in part, rev'd in part*, 422 F.2d 1205, 7 U.C.C. Rep. Serv. 81 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970).

consequential damages. Sawyer argued that the consequential damage exclusion failed of its essential purpose along with the repair and rescission limitations.[50] The *Lewis* court reasoned that U.C.C. section 2-719(3) takes priority over U.C.C. section 2-719(2) when the parties agreed to exclude consequential damages. Agreeing with the Third and Ninth Circuits, the court determined that a consequential damage disclaimer is an independent provision, valid unless found to be unconscionable.[51] In so deciding, the Sixth Circuit recognized the basic principle of statutory construction that the "particular governs over the general."[52] Since the district court had permitted the recovery of lost profits, clearly a consequential damage remedy, the Sixth Circuit remanded the case for a determination of whether the consequential damage limitation was unconscionable. Unless the district judge determines on remand that the limitation is unconscionable, the jury award of $25,823 in lost profits must be set aside.[53] The appellate court found that the jury's award of $27,080 in Freon costs would be upheld,[54] in any event, as incidental[55] rather than consequential damages.

In summary, the remand in the *Lewis* case to determine whether the consequential damage exclusion was unconscionable supports the underlying Code policy of freedom of contract, permitting merchants to allocate business risks. Where parties of relatively equal bargaining power negotiate a price based upon risk allocation and expressly exclude any liability for consequential damages, the failure of a limited remedy provision is not enough to require the seller to absorb losses that the buyer agreed to bear.[56] On the other hand, where the exclusion of a consequential damages provision is

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50. The repair and rescission limitation provisions were also contained in the printed portions of the contract. *See supra* note 23.

51. 709 F.2d at 434 n.9. *But see* Deere v. Hand, 211 Neb. 549, 319 N.W.2d 434 (1982); Soo Line R.R. v. Fruehauf, 547 F.2d 1365 (8th Cir. 1977); Bosway Tool & Steel Co. v. Michigan Mach. Co., 65 Mich. App. 426, 237 N.W.2d 48 (1976).

52. 709 F.2d at 435.

53. *See* Delhomme Indus., Inc. v. Houston Beechcraft, 669 F.2d 1049 (5th Cir. 1982)(The unconscionable issue is a question of law whereas the failure of essential purpose is a question of fact).

54. 709 F.2d at 436 n.19.

55. The cost of the additional Freon, since expressly provided for in the contract, could probably have been recovered as a primary or direct damage of breach under U.C.C. § 2-714(2). *See* WHITE & SUMMERS, *supra* note 29, at 385, discussing the case of Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971).

56. S.M. Wilson & Co. v. Smith Intern, Inc., 587 F.2d 1363 (9th Cir. 1978).

concealed or obscure, and not bargained for by the parties, the exclusion is unconscionable and unenforceable.[57] By focusing on the parties allocation of risk at the time of the contracting and on whether the failure of the exclusive remedy has caused consequential loss beyond that which the buyer had agreed to assume, the court may determine whether it would be unconscionable for such loss to be left on the buyer.[58]

C. *Quantum Meruit* Recovery in the Absence of an Enforceable Contract

In *Klewicki Co. v. American Screw Products,*[59] the Sixth Circuit reviewed an alleged breach of contract case in which Klewicki, acting as an agent for American Screw, influenced the sales to Rockwell-Standard, one of American Screw's prime customers. After a trial on the merits, the district court determined that the parties had not come to an expressed compensation agreement, but that there was an understanding that Klewicki would receive some compensation.[60] In the absence of an agreement as to the amount of compensation the district court ruled that Klewicki was entitled to recover in *quantum meruit*[61] and fixed the award at one percent of the gross sales to Rockwell for the period involved.[62]

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57. Jutta's, Inc. v. Fireco Equip. Co., 150 N.J. Super. 301, 375 A.2d 687 (1977). Disparity in bargaining power may render an exclusion of consequential damages clause unconscionable. Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976). In most commercial cases, however, this attack on the exclusionary clause will be unsuccessful. WHITE & SUMMERS, *supra* note 29, at 485. For a discussion recommending closer scrutiny by the courts for possible unconscionability in commercial computer contracts see Comment, *U.C.C. § 2-719 As Applied to Computer Contracts—Unconscionable Exclusions of Remedy?: Chatlos Sys., Inc. v. National Cash Register Corp.*, 14 CONN. L. REV. 71 (1981).

58. ANDERSEN, *supra* note 29, at 791.

59. 690 F.2d 85 (6th Cir. 1982).

60. *Id.* at 86-87. Language used in the opinion makes it unclear whether the contract lacked a specific compensation term or whether no contract existed. In view of what the court found with reference to the *Biagini* case, *see infra* note 63, it is possible that the court found that the parties, failing to agree to the essential contract term of remuneration, were not contractually bound. *Id.* at 87.

61. *Quantum meruit* developed as a common count of the action of general assumpsit for the value of work done (as much as he deserves). Quasi-contract refers to any money claim for the redress of unjust enrichment and is the broader category which includes *quantum meruit*, the form of action used for claims to payment for services. FARNSWORTH, *supra* note 12, at 99. "A quasi contractual obligation is one that is created by the law for reasons for justice, without an expression of assent." CORBIN ON CONTRACTS § 19 at 46 (1960).

62. 690 F.2d at 87. Klewicki argued for five percent of the gross sales; American Screw

The Sixth Circuit per curiam opinion reviewed the trial court's application of Michigan case law on *quantum meruit* recovery to the instant facts. In *Biagini v. Mocnik*,[63] the supreme court restated the Michigan rule that a *quantum meruit* recovery is permissible when it is found, as a matter of fact, that no express contract existed.[64] The *Biagini* court viewed this rule as a corollary to the general principle allowing a *quantum meruit* recovery where an express agreement is unenforceable because of the statute of frauds or other statute that prevents recovery on the terms of the agreement. Accordingly, *quantum meruit* recovery is available in the absence of an enforceable contract. *Quantum meruit* recovery is not available where parties differ as to the terms of an express agreement and there is evidence tending to support the claim of each party.[65] In such a case the trier of fact determines the terms of the contract and damages based upon those terms.

In applying these rules to *Klewicki*, the Sixth Circuit court must have concluded that no enforceable contract existed between Klewicki and American Screw, rather than no specific compensation agreement.[66] If the parties were contractually bound but the contract contained no remuneration term, the *quantum meruit* recover was inappropriate.[67]

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maintained that Klewicki was only entitled to expenses.

63. 369 Mich. 657, 120 N.W.2d 827 (1963).

64. *Id.* at 658-59, 120 N.W.2d at 828.

65. *Id.* citing Geistert v. Scheffler, 316 Mich. 325, 25 N.W.2d 241 (1946), quoting from Millar v. Macy Co. 263 Mich. 484, 248 N.W. 879 (1933).

66. *See supra* note 60. "No specific compensation agreement" could mean either no remuneration term or no contract.

67. Under those circumstances either the trier of fact would determine what the terms of the contract were, or the court would determine what was a reasonable compensation term under the circumstances. *See supra* note 65 and RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979), which provides for supplying an omitted essential term as follows: "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." U.C.C. § 2-305(1)(1978) is the comparable provision for supplying a missing price term:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Id.

Klewicki did not present the typical scenario of facts where a successful broker is precluded from recovering an otherwise rightful commission due to a licensing violation.[68] To the contrary, the trial court applied a *quantum meruit* recovery where the value of Klewicki's services may be said to have been somewhat speculative. A *quantum meruit* recovery is equitable in nature based on the principle that parties should be compensated for work performed.[69] The problem, however, in a broker's commission case is that a broker typically receives compensation only when he or she successfully procures a sale or service. Therefore, the commission is not directly related to the work performed. This problem was recognized in *Bishop v. American States Life Insurance Co.*,[70] where the court pointed out that a *quantum meruit* recovery based on the value of services performed, is inconsistent with fact situations where remuneration is based upon a percentage commission.

The Sixth Circuit was also faced with precedent which denied a *quantum meruit* recovery to a broker. In *Arsham v. Banci*,[71] the Sixth Circuit held that "[a]n *unsuccessful* broker may not recover in *quantum meruit* when the principal subsequently sells to the same person whom the broker has contacted."[72] The Sixth Circuit distinguished *Arsham* from *Klewicki* emphasizing that Klewicki has opened the door to increased sales with Rockwell, and therefore was a successful, not an unsuccessful, broker.

Accordingly, *Klewicki* permits successful brokers to recover a reasonable commission based on the theory of *quantum meruit*.[73]

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68. *See, e.g.*, Marina Management Corp. v. Brewer, 572 F.2d 43 (2d Cir. 1978)(recovery barred by a Connecticut licensing statute); Tackett v. Mullins, 612 S.W.2d 909 (Tenn. 1981)(recovery permitted even though broker had no license); Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550 (1st Cir. 1974).

69. *See* Bishop v. American States Life Ins. Co., 635 S.W.2d 313 (Ky. 1982). "The common law theory of *quantum meruit* is rooted in the idea that, any contractual obligation notwithstanding, one should be compensated based on the amount of work one has performed (*i.e.*, one gets what one deserves, no more and no less)." *Id.* at 314.

70. *Id.*

71. 511 F.2d 1108 (6th Cir. 1975).

72. *Id.* at 1115 (emphasis added). It should be noted that the court first found that no contract existed between Arsham and Banci before examining the possibility of a *quantum meruit* recovery.

73. 690 F.2d at 87. This rule should only be applied in broker cases in the absence of an enforceable contract.

The determination of the value of those services[74] rests within the discretion of the trial judge, guided by principles of equity.

II. Breach of Warranty Statutes of Limitations

One case during the survey period illustrates the problem courts face when application of a statute of limitations provisions precludes a diligent plaintiff from obtaining a recovery. In *Lawson v. London Arts Group*,[75] the Sixth Circuit was asked to decide whether plaintiff's cause of action for breach of an express warranty was timely under two different statute of limitations provisions, and which of the provisions applied.

Facts recited in the *Lawson* case indicated that in 1972 Mrs. Lawson purchased a pastel from London Arts for $29,000. London Arts issued a written warranty of authenticity stating that the pastel was an original work of Frederick Remington.[76] In 1976, Mrs. Lawson began to question the authenticity of the pastel. After obtaining expert opinions that the pastel was indeed a copy, suit was brought in 1979 for breach of warranty in the Eastern District Court of Michigan. Although not explicitly stated in the opinion,[77] it appears that the breach of warranty action was argued alternatively under the Uniform Commercial Code express warranty provision[78] and under Michigan's Warranty in Fine Arts Statute[79]

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74. The broker is "entitled to recover what his labor rendered or materials furnished were reasonably worth." 369 Mich. at 659, 120 N.W.2d at 828.

75. 708 F.2d 226 (6th Cir. 1983).

76. The written warranty of authenticity provided:

> This is to certify that
> An Indian Brave by Frederick Remington
> Drawing done in 1901
> purchased by Mrs. Jerry Lawson
> from Robert James Price
> is an original work as described. Should it prove to be other than described, the seller will refund the purchase price in full . . . .

77. This can be gleaned from the fact that the court was asked to choose between the U.C.C. statute of limitations provision, § 2-725 and the Revised Judicature Act § 600.5833. *See infra* note 83.

78. U.C.C. § 2-313 (1978) provides:

> (1) Express warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the

which provides in relevant part:

> when an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, the description shall be presumed to be part of the basis of the bargain and shall create an express warranty of the authenticity of the authorship as of the date of the sale or exchange. The warranty shall not be negated or limited because the art merchant in the written instrument did not use formal words such as "warrant" or "guarantee" or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the art merchant's opinion.[80]

The jury found that the warranty of authenticity of authorship was made in bad faith and awarded the plaintiff $140,000 in damages.[81] The court of appeals affirmed the district court award, but upon a different statutory basis.

The only issue on appeal was whether Mrs. Lawson's action was barred by the statute of limitations since she purchased the pastel in February of 1972, but did not file suit until March of 1979.[82] The parties and, apparently, the court of appeals agreed that a

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> bargain creates an express warranty that the goods shall conform to the description.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

For a discussion of the use of the warranty provisions of the U.C.C. in art fraud cases, see Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409 (1972).

79. MICH. COMP. LAWS ANN. §§ 442.321-25 (West Supp. 1983), effective January 1, 1971. Several states, in addition to Michigan, have enacted special art legislation to supplement U.C.C. warranty provisions. *See* Comment, *Consumer Protection Legislation in Sale of Original Prints*, 57 U. DET. J. URB. L. 55, at 56 n.13 (1979).

80. MICH. COMP. LAWS ANN. § 442.322(a)(West Supp. 1983).

81. 708 F.2d at 228. The Michigan statutory scheme provides that "[a]n art merchant whose warranty of authenticity of authorship was made in good faith shall not be liable for damages beyond the return of the purchase price which he received." MICH. COMP. LAWS ANN. § 442.324(3) (West Supp. 1983). The purchase price was $29,000 in 1972. Expert witnesses testified that the original Remington would have been worth between $150,000 and $175,000 at the time of trial. 708 F.2d at 227. The Sixth Circuit treated the difference between the purchase price and the jury award as consequential damages, presumably loss of investment profits on the Remington pastel. *See* U.C.C. § 2-715(2)(a)(1978).

82. 708 F.2d at 228.

four-year statute of limitations period applied.[83] The question presented was when the statutory period began to run.

Under the U.C.C., the statutory period begins to run under the general rule, in a breach of warranty action, upon tender of delivery:

> *A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made*, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[84]

London Arts maintained that, under this language, Mrs. Lawson's cause of action was barred early in 1976, four years after tender of delivery, but before Mrs. Lawson knew of the breach. Both the district and appellate courts refused to apply this general rule. The district court held that the exception to the general rule of section 2-725(2) applied, that the warranty extended to the "future performance" of the pastel and, consequently, the cause of action accrued when the breach was or should have been discovered.[85] The plaintiff did not suspect the pastel was a forgery until 1976; the statute of limitations under the district court's view did not, therefore, begin to run until 1976.

Without adequate analysis or reference to any authority, the appellate court found the district court's application of the exception language of section 2-725(2) to be erroneous.[86] Nonetheless, the Sixth Circuit found Mrs. Lawson's cause of action timely under the

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83. *Id.* at 228 and 229. A four-year period was appropriate if the cause of action was based upon breach of an express warranty under the U.C.C. provisions: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." U.C.C. § 2-725(1)(1978).

For a cause of action brought under the Michigan Fine Arts Statute, the Revised Judicature Act provides a six-year period for breach of contract: "The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract." MICH. COMP. LAWS § 600.5807(8)(1967).

Since the appellate court applied the accrual provision of the R.J.A. § 600.5833, the appropriate limitation period was six years under the R.J.A. Application of a four-year period of limitation did not, however, affect the outcome of the case as the court found that the plaintiff complied with the four-year limitation. 708 F.2d at 229.

84. U.C.C. § 2-725(2)(1978)(emphasis added).

85. 708 F.2d at 228.

86. *Id.*

Revised Judicature Act which provides: "[i]n actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered."[87] The court held that because Mrs. Lawson was untrained in art, she could not have reasonably discovered the breach earlier than 1976.[88] The suit was filed timely in 1979, within the "four-year"[89] statute of limitations period.

Given the special Michigan statutory provisions dealing with fine art warranties,[90] the Sixth Circuit's application of the Revised Judicature Act's accrual of cause of action provision was appropriate. However, in the absence of that special warranty provision, the appellate court would have been forced to deal with the U.C.C. statute of limitations and its accrual provision. The troublesome aspect of the U.C.C. provision is that under the general rule a cause of action accrues whether or not the aggrieved party is aware of the breach. Furthermore, the typical cause of action, where discovery of the breach might take in excess of four years, is a breach of warranty action.

Statute of limitations provisions are intended to prevent individuals from sleeping on their rights.[91] Obviously, this underlying rationale for a limitation period is not supported in a case where the aggrieved party's cause of action is barred before the party is aware of any injury.[92] As previously indicated, application of the U.C.C. general rule to the instant facts would have resulted in Mrs.

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87. MICH. COMP. LAWS § 600.5833 (1967).

88. 708 F.2d at 229.

89. *See supra* note 83.

90. *See supra* note 79.

91. The general purpose of statute of limitations is to avoid stale claims so that the opposing party has a fair opportunity to defend. Bigelow v. Walraven, 392 Mich. 566, 221 N.W.2d 328 (1974); Wahl v. Brothers, 60 Mich. App. 66, 230 N.W.2d 311 (1975).

92. The U.C.C. policy underpinning the statute of limitations provision are different from the historic policy considerations discussed at note 91, *supra*. The purpose of § 2-725 was to introduce a uniform statute of limitations for sales contracts which would eliminate the jurisdictional variations and provide relief for concerns doing business on a nationwide scale whose contracts had been governed by different statutory periods. U.C.C. § 2-725 comment (1978). In the typical commercial sale of goods contract, the defect and the related breach of warranty action would be discovered long before the four-year statutory period had expired. The Code comment further indicates that a four-year period was selected as most appropriate to modern business practice because it corresponds with the normal record keeping period. This rationale may no longer be justified in light of computer technology's capacity for indefinite storage of information with minimal space usage.

Lawson's cause of action being barred prior to her suspecting or learning that the pastel was a fake.

As a consequence of such apparent unfairness, courts, when faced with application of the U.C.C. general rule, have developed a number of approaches to avoid the harsh result. Case law dealing with statute of limitations provisions is murky and muddled at best.[93]

The first approach available to a court is to apply the exception language of the U.C.C. general rule, that "*where a warranty explicitly extends to future performance of the goods* and discovery of the breach must await the time of such performance *the cause of action accrues when the breach is or should have been discovered.*"[94] The Code comments do not recommend a test or shed any light on how to determine when a warranty "explicitly extends to future performance."[95] It should be clear, however, that this does not occur in the usual case but is the exception to the rule.[96] Express warranties which extend for a specified period of time are said to fall into this exception category.[97] On the other hand, courts are unlikely to find that an implied warranty extends to future performance.[98] Case law provides inconsistent analyses, because courts have difficulty determining which warranties extend to future performance. It is, therefore, possible for a court to use the exception standard to postpone accrual of a cause of action to avoid a diligent party from being prematurely barred. Perhaps the district court did just that in the instant case, particularly when faced with the jury's finding that the defendant had acted in bad faith.

Another method for avoiding the tender of delivery accrual date,

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93. "Section 2-725 offers a sane and workable statutory scheme, but it is one the courts will infrequently follow when the plaintiff's blood has been spilled or when the defendant is a remote seller." WHITE & SUMMERS, *supra* note 29, at 420.

94. U.C.C. § 2-725(2)(1978)(emphasis added). The district court in *Lawson* applied this language to the warranty regarding the Remington pastel. *See supra* note 76.

95. The only reference to a future performance warranty in the official Code comments to § 2-725 states: "Subsection (2), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance."

96. WHITE & SUMMERS, *supra* note 29, at 419.

97. R. NODSTROM, HANDBOOK OF THE LAW OF SALES, at 563 (1970).

98. SCHMITT and HANKO, *For Whom the Bell Tolls—An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for Future Performance Warranties*, 28 ARK. L. REV. 311, 317 (1974).

in a case involving personal injury, is for a court to apply a tort statute of limitations rather than the U.C.C. warranty limitation period. Typically, the tort action will accrue at the time of the injury.[99] Even though the limitation period is typically only two or three years in length, the plaintiff has been made aware of the cause of action by the injury and will not be barred without knowledge of the claim.[100] Part of the confusion results from the overlap of strict tort liability and contract breach of warranty. Many fact situations create both causes of action, accordingly, the problem becomes one of which statute of limitations to apply. Case law has not clarified when a cause of action should be labeled tort, rather than warranty, for purposes of statute of limitations.[101] In several cases it appears that the court selected the provision on equitable considerations, to preserve rather than bar plaintiff's cause of action.[102]

Even in contract cases where no personal injury was involved, courts have avoided application of the shorter U.C.C. limitation period by labeling the contract as predominantly a service rather than goods contract.[103] The six-year statute of limitations for actions on simple or implied contracts governs in a service contract.[104] In an illustrative Michigan case,[105] the plaintiff purchased

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99. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 144 (4th ed. 1971). The Michigan statute is worded somewhat differently: "The claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MICH. COMP. LAWS § 600.5827 (1967). Where the cause of action is to recover for personal injuries, it typically accrues when the plaintiff is injured. *See, e.g.*, Pryber v. Marriott Corp., 98 Mich. App. 50, 296 N.W.2d 597 (1980), *aff'd*, 411 Mich. 887, 307 N.W.2d 333 (1981).

100. In some jurisdictions a medical malpractice cause of action accrues when the plaintiff should have discovered the injury. Note, *Medical Malpractice: A Survey of Statutes of Limitation*, 3 SUFFOLK U.L.REV 597 (1969).

101. WHITE & SUMMERS, *supra* note 29, at 416.

102. By way of example, in the following cases the trial court applied the four-year U.C.C. provision, preserving the plaintiff's cause of action, despite a privity bar. The appellate court reversed, finding the tort statutes of limitation applicable, barring the causes of action. Infante v. Montgomery Ward & Co., 49 A.D.2d 72, 371 N.Y.S.2d 500 (1975); Salvador v. Atlantic Steel Boiler Co., 256 Pa. Super. 330, 389 A.2d 1148 (1978); Becker v. Volkswagen of Am., Inc., 52 Cal. 3d 794, 125 Cal. Rptr. 326 (1975).

103. *See, e.g.*, Cacace v. Morcaldi, 37 Conn. 2d 735, 435 A.2d 1035 (1981); Perlmutter v. Don's Ford, Inc., 409 N.Y.S.2d 628, 96 Misc.2d 719 (1978). Dixie Lime & Stone Co. v. Wiggins Scale Co., 144 Ga. App. 145, 240 S.E.2d 323 (1977).

104. For Michigan's six-year statute of limitations, see MICH. COMP. LAWS § 600.5807(8)(1967) and *supra* note 83 discussing its application in the instant case.

105. H. Hirschfield Sons Co. v. Colt Indus. Operating Corp., 107 Mich. App. 720, 309 N.W.2d 714 (1981).

a large in-ground railroad and truck scale from the defendant. Even though the plaintiff discovered cracks in the concrete surface which housed the scale shortly after installation, the complaint was not filed for seven years. The appellate court reversed and remanded the trial court's judgment that the U.C.C. standard of four years from tender of delivery barred the cause of action. The six-year Revised Judicature Act statute of limitations,[106] accruing when the breach of warranty was discovered or reasonably should have been discovered,[107] applied.

This commentator recommends a two-step analysis to courts faced with a statute of limitations dilemma. First, where multiple causes of action are plead, the statute of limitations applied should match the cause of action proved. For example, if a plaintiff establishes the elements of breach of implied warranty under the U.C.C. and strict liability in tort, but fails to give timely notice to the seller under U.C.C. section 2-607(3)(a),[108] the tort statute of limitation should be applied. The statute of limitation provision applied should mirror the cause of action plead, proven, and not otherwise barred.[109] Secondly, where application of the appropriate statutory provision proves unfair and inconsistent with the reason of the rule, the court need not apply the rule.[110] The court should, however, acknowledge that the statutory limitation of remedy is being disregarded because the reason of the limitation is inapplicable.

A final alternative is legislative action. Legislatures in several jurisdictions[111] have addressed the problems presented by the four-year period by adopting non-uniform amendments to section 2-725. In several states the four-year period has been increased to

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106. *Id.* at 727, 309 N.W.2d at 719, applying MICH. COMP. LAWS § 600.5807(8)(1967).

107. *Id.* applying MICH. COMP. LAWS § 600.5833 (1967).

108. Failure to give timely notice of breach of warranty under § 2-607 bars recovery. *See, e.g.*, Wagmeister v. A.H. Robbins Co., 64 Ill. App. 3d 964, 382 N.E.2d 23 (1978).

109. This view is discussed at length in Justice Williams dissenting opinion in Parish v. B.F. Goodrich Co., 395 Mich. 271, 284, 235 N.W.2d 570, 576 (1975). If a plaintiff properly relies upon a U.C.C. warranty and chooses to base her claim upon the U.C.C., the statute of limitation contained in the Code should govern. *Id.* at 291, 235 N.W.2d at 579.

110. *See*, S. MENTSCHIKOFF, COMERCIAL TRANSACTIONS 11 (1970). Comment 1 to § 1-102 provides: "[Courts] have disregarded a statutory limitation of remedy where the reason of the limitation did not apply . . . . Nothing in this Act stands in the way of the continuance of such actions by the courts."

111. Fourteen jurisdictions have adopted variations from the official text: Alabama, California, Colorado, Iowa, Maine, Mississippi, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, and Wisconsin.

five[112] or six[113] years. In one state, a party suing for breach of warranty, alleging a defect in the product, has ten years to commence a cause of action.[114] More significantly, several jurisdictions have modified the time at which a cause of action accrues.[115] For example, under the Alabama Code, "a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs."[116] The most liberal non-uniform provision applies across the board to all breach of warranty actions and provides that the cause accrues "when the breach is or should be discovered."[117]

III. Parol Evidence Rule

In *Sawyer v. Arum*,[118] the court of appeals was asked to determine whether the defendant's letter of obligation promising to pay the plaintiff $25,000, was a separate enforceable contract or a preliminary writing not intended to be part of the final contractual agreement between the defendant and heavyweight boxer, Leon Spinks. The district court, in a bench trial, found that the letter in question never became a part of the final integration. The Sixth Circuit affirmed the trial court, with one panel member dissenting. The dissenter found the letter to be a separate, enforceable agreement.[119] According to the dissenter, none of the evidence presented at trial showed the letter to be anything but a separate agreement. As such, the trial court's findings should have been reversed and the case remanded to determine whether the plaintiff had performed the services required, entitling him to damages for breach of contract.

Factually,[120] the plaintiff was a trust officer in a Detroit bank

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112. Okla. Stat. Ann. tit. 12A, § 2-725 (West 1963).

113. Miss. Code Ann. § 75-2-725 (1972); S.C. Code Ann. § 36-2-725 (Law. Co-op. 1976); Wis. Stat. Ann. § 402.725 (West 1964 & Supp. 1983).

114. R.I. Gen Laws § 6A-2-725 (Supp. 1983).

115. Ala. Code § 2-725 (1975); Me. Rev. Stat. Ann. tit. 11, § 2-725 (1964 & West Supp. 1984); S.C. Code Ann. § 36-2-725 (Law. Co-op. 1976).

116. Ala. Code § 2-725 (1975). Similarly, see Maine statutory provision which applies to all breach of warranty personal injury cases, and provides that the cause of action accrues when the injury takes place. Me. Rev. Stat. Ann. tit. 11, § 2-725 (1964 & West Supp. 1984).

117. S.C. Code Ann. § 36-2-725 (Law. Co-op. 1976).

118. 690 F.2d 590 (6th Cir. 1982).

119. *Id.* at 595.

120. The majority and dissenting opinions agree as to these facts. They disagree as to

administering funds for Spinks and acting as his interim manager. Plaintiff met with the defendant, a full-time boxing promoter, and Spinks' attorney to discuss future boxing matches. Three documents resulted from this meeting: one, a "Bout Agreement" which called for Spinks to fight Gerrie Coetzee in June of 1979 for $100,000 and fifty percent of all revenues in excess of $250,000; two, a letter granting defendant's corporation an option to promote future fights involving Spinks; and three, the letter, at issue in the instant case, agreeing to pay the plaintiff $25,000 for promotional and other services to be rendered. Spinks refused to fight for $100,000. Sometime later, the $100,000 figure in the "Bout Agreement" was lined out and a $250,000 figure inserted. The defendant resigned this altered "Bout Agreement."

The question presented was whether the defendant agreed to pay the plaintiff $25,000 only if Spinks agreed to fight for $100,000, as part of "one integral package,"[121] or whether defendant was contractually bound to pay plaintiff whether or not Spinks fought and regardless of the amount. Resolution of this question centers on application of the parol evidence rule.[122] When a party claims that a writing represents the final and complete agreement of the parties, the court must determine whether the parties intended the written instrument to be a final expression of their agreement—an integration.[123] Once the court determines that the writing is an in-

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whether the three writings are separate enforceable agreements. *See* text *infra*.

121. 690 F.2d at 591.

122. The most eminent authorities state the parol evidence rule as follows:

> When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 CORBIN ON CONTRACTS, § 573 at 357 (1960). "[The parol evidence] rule requires . . . the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing." 4 WILLISTON ON CONTRACTS § 631 at 948-49 (3rd ed. 1961). The modern statement of the rule can be found in RESTATEMENT (SECOND) OF CONTRACTS § 213 (1979).

123.

> Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence. The issue is distinct from the issues whether an agreement was made and whether the document is genuine, and also from the issue whether it was intended as a complete and exclusive statement of the agreement . . . . Ordinarily the issue whether there is an integrated agreement is determined by the trial judge in the first instance as a question preliminary to an interpretative ruling or to the application of the parol

tegration, it must then determine whether the integration is complete or partial.[124] Under the parol evidence rule a complete integration cannot be contradicted or supplemented by extrinsic evidence of prior negotiations or agreements.[125] A partial integration may be supplemented by consistent additional terms.[126] In the *Sawyer* case, the court had to decide whether the letter promising to pay the plaintiff $25,000 was an integration.

Historically, Michigan courts appear[127] to have applied the restrictive "four corners" or "face of the document" test to determine the intention of the parties and to decide whether the parties intended the writing as a complete integration of their agreement.[128] Under this test a writing was presumed to express the in-

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> evidence rule . . . . After the preliminary determination, such questions as whether the agreement was in fact made may remain to be decided by the trier of fact . . . . [A] written agreement complete on its face is taken to be an integrated agreement in the absence of contrary evidence.

RESTATEMENT (SECOND) OF CONTRACTS § 209 comment c (1979).

124. RESTATEMENT (SECOND) OF CONTRACTS § 210(3) (1979) provides: "Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or application of the parol evidence rule."

125. *See supra* note 122.

126. RESTATEMENT (SECOND) OF CONTRACTS § 216 (1979) provides:

> (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
>
> (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
>
> (a) agreed to for separate consideration, or
>
> (b) such a term as in the circumstances might naturally be omitted from the writing.

127. The exact test used by mid-century Michigan courts is difficult to discern because frequently the test used to determine the intention of the parties in deciding the question of integration is not properly distinguished from the so-called "plain meaning" test used for interpreting or construing a writing. The plain meaning rule provides that where a writing appears to be plain and unambiguous on its face, extrinsic evidence is inadmissible for purposes of interpretation.

The Michigan cases, *see infra* note 128, appear to lump the questions of intention to integrate and ambiguity together into one test, a combination of the "four corners" and "plain meaning" tests. A Michigan court under these old cases could look at the face of a document and determine simultaneously that the parties intended it to be a complete integration. The language being clear and unambiguous it would be construed according to its plain meaning without reference to extrinsic evidence.

128. Brachman v. Wheelock, Inc., 343 Mich. 230, 72 N.W.2d 246 (1955); Sheldon-Seatz, Inc. v. Coles, 319 Mich. 401, 29 N.W.2d 832 (1947); Michigan Chandelier Co. v. Morse, 297 Mich. 41, 297 N.W. 64 (1941).

tentions of the parties and was deemed a complete integration, an embodiment of all the rights and obligations of the parties as to the subject matter covered by the writing, if the document appeared entire on its face. A court, by merely reviewing the writing itself, determined whether the parties intended a complete integration of their agreement. A writing complete on its face, without facial ambiguity,[129] was an integration. Consideration of extrinsic evidence to decide whether such a writing constituted an integration was prohibited. Plaintiff apparently intimated that this was the approach the court should use in determining whether the letter was an integration.[130]

The district and appellate courts rejected this approach, and applied the more recent Michigan Supreme Court pronouncements[131] with regard to establishing the existence of an integration. "Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshhold question of whether the written instrument is such an 'integrated' agreement."[132] Accordingly, the court applied the Restatement rule that "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish that the writing is or is not an integrated agreement."[133]

In examining the other writings and testimony of the parties to determine whether the letter was an integrated agreement, the district court and a majority of the appellate court found that the parties intended the three original documents to be treated as one integral package.[134] However, Spinks declined the terms of that package. When the "Bout Agreement" was subsequently altered, it became the final integration of the parties. The two letters, which were part of the originally negotiated package, were not incorporated into the final agreement.

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129. Michigan courts included this "facial ambiguity" language when applying the "face of the document test." *See supra* note 127.

130. 690 F.2d at 593.

131. Goodwin, Inc. v. Coe Pontiac, Inc., 392 Mich. 195, 220 N.W.2d 664 (1974), *rev'd*, 43 Mich. App. 640, 204 N.W.2d 749 (1972); N.A.G. Enters., v. All State Indus., 407 Mich. 407, 285 N.W.2d 770 (1979), *rev'd*, 85 Mich. App. 194, 270 N.W.2d 738 (1978).

132. 407 Mich. 407, 410 n.3, 285 N.W.2d 770, 771 n.3 (1979).

133. RESTATEMENT (SECOND) OF CONTRACTS § 214(a)(1979).

134. The Sixth Circuit arrived at this decision in the absence of any evidence that the plaintiff understood that the three documents constituted one agreement. *See* 690 F.2d at 592 n.1.

The dissenter, in evaluating the evidence, found the letter to be a separate agreement, an integration, primarily because of an absence of evidence establishing that the plaintiff understood that he would receive the $25,000 only if Spinks agreed to fight for $100,000 pursuant to the original "Bout Agreement".[135] The dissenter agreed with the majority as to the law to be applied; he disagreed with the factual findings.

IV. Separate Contract Doctrine

The case of *UMIC Government Securities v. Pioneer Mortgage Co.*[136] presents two contract questions. First, was UMIC's retention of monies due Pioneer on a prior separate contract, until completion of a subsequent contract, an anticipatory repudiation of the subsequent contract? Secondly, did the retention alone render Pioneer so insecure as to demand adequate assurance of performance?[137]

UMIC and Pioneer entered into a number of contracts involving the purchase and sale of Government National Mortgage Association certificates (GNMAs).[138] Pursuant to a May 14, 1980 contract, UMIC was required to deliver eleven GNMAs to Pioneer and Pioneer was obligated to deliver thirteen GNMAs to UMIC. On the settlement day, May 14, the GMNAs were paired off and Pioneer

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135. *Id.* at 595.

136. 707 F.2d 251 (6th Cir. 1983).

137. U.C.C. § 2-609(1)(1978), dealing with demand for adequate assurance of performance, provides:

> A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he recieves such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

There is a similar provision in the Restatement (Second) of Contracts § 251(1)(1979) which states:

> Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

For a comparison of the two sections see generally White, *Eight Cases and Section 251*, 67 Cornell L. Rev. 841 (1982).

138. The purchase and sale of GNMAs is similar to that of commodities, with delivery to be made at a future date called a settlement date.

delivered two GNMAs to UMIC, which in turn paid two million dollars to Pioneer. UMIC owed Pioneer an additional $92,895.82 in trading profits.[139] UMIC retained the trading profits because UMIC questioned Pioneer's ability to perform on the June 18, 1980 contracts (June contract).

The withheld funds formed the basis of the dispute which led to the repudiation of the June contract. UMIC understood that Pioneer agreed to allow UMIC to withhold the $92,895.82 until the GNMA transactions of June 18, were completed. Further, this alleged understanding was delineated in a letter from UMIC to Pioneer dated May 30. Pioneer, on the other hand, in a letter dated June 4, stated that there was no such agreement. Therefore, Pioneer considered the retention an anticipatory repudiation of the June contract.[140] On June 5, UMIC expressly stated to Pioneer its intention to perform the June contract, proposed to tender a check for the withheld funds and made other assurances that no anticipatory repudiation had been made by UMIC. The following day UMIC filed suit seeking injuctive relief and damages.[141] Pioneer filed a counterclaim for the withheld trading profits.

Although GNMAs are not goods, the trial court applied Article II of the U.C.C. by way of analogy.[142] The trial court found: one, Pioneer never agreed to UMIC's retention of the trading profits

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139. The amount of the trading profit is determined by the differences in the contract price for each individual GNMA.

140. In letters dated May 28, 1980 and June 4, 1980, Pioneer questioned UMIC's financial condition. In the June 4 letter, Pioneer stated it considered UMIC's retention of funds as an anticipatory repudiation of the June contract and therefore Pioneer was under no obligation to make further deliveries of GNMAs to UMIC. 707 F.2d at 252.

141. Pursuant to the law of Tennessee, when the conduct of one party evidences an intent not to be bound by a future contract, the other party has the option to terminate the contract and maintain an action for damages caused by the anticipatory repudiation. City of Memphis v. Ford Motor Co., 304 F.2d 845 (6th Cir. 1962); Third Nat'l Bank in Nashville v. Hardi-Gardens Supply of Illinois, 380 F. Supp. 930 (M.D. Tenn. 1974); Church of Christ Home for Aged v. Nashville Trust Co., 184 Tenn. 629, 202 S.W.2d 178 (1947).

142. 47-2-105 TENN. CODE ANN. comment 1 (1966) states:

> "Investment securities" are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities (as was done with the Original Sales Act in Agar v. Orda, 264 N.Y. 248, 190 N.E. 479, 99 A.L.R. 269 (1934)) when the reason for that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

Id.

due in the May contracts; two, UMIC's retention of the funds was a unilateral attempt to change the June contracts; and three, Pioneer's suspension of performance was authorized by UMIC's actions. As a matter of law, the court held that UMIC's letter of May 30, constituted a total repudiation by UMIC of the June contracts. A judgment was entered in favor of Pioneer on its counterclaim for $92,895.82 plus interest at 11¾%.[143]

UMIC appealed on two contractual grounds. UMIC contended that it did not repudiate the June contracts and that its actions did not constitute sufficient grounds to justify demand for adequate assurances.[144] The court of appeals affirmed Pioneer's $92,895.82 recovery and reversed the trial court's determination that UMIC repudiated the June contracts.[145]

Even though Pioneer treated UMIC's letter of May 30, as an overt communication of an intention not to perform the June contracts, the Sixth Circuit held that UMIC's retention of funds was not an anticipatory repudiation of the June contracts.[146] UMIC's letter of May 30,[147] states only that UMIC was withholding the trading profits until completion of the June contracts. This was not an overt communication not to perform the June contracts. On the contrary, it declared UMIC's intention to perform the June contracts. The Sixth Circuit went on to state that UMIC's retention of funds was merely an attempt to modify the May contracts.[148]

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143. The rate of interest to be charged was also at issue in this case. The trial court awarded 11¾% in accord with the alleged agreement between Pioneer and UMIC allowing UMIC to retain the funds (with interest at 11¾% payable) until June 18, 1980. The court of appeals held that only the statutory interest rate should be awarded. Since the trial court found that the agreement was not endorsed by both parties, it was incorrect to grant Pioneer interest under a unilateral agreement. 707 F.2d at 254.

144. *See supra* note 137.

145. 707 F.2d at 254.

146. *Id.*

147. UMIC's May 30 letter reads, in pertinent part, as follows:

> Pursuant to recent telephone conversations with UMIC, this letter will confirm that UMIC is presently holding $92,895.82 of monies owed to Pioneer Mortgage Company regarding May GNMA transactions. UMIC will hold the money pending the completion of the June 18, 1980 GNMA transactions and the receipt of any open securities. Accordingly, UMIC has agreed to pay interest on such funds at the current lending rate, initially 11¾ percent .

Id. at 253.

148. UMIC's action was, in essence, more than an attempt to modify. UMIC breached the May contract by withholding performance. UMIC was obligated to pay the trading prof-

Pioneer was obligated to perform on the June contract even if UMIC breached the May contract because the trial court held the contracts to be separate.[149] Under the "separate contract doctrine" enunciated in *Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc.*[150] a party is not excused from performing contractual duties simply because the other party has breached a prior, separate agreement between them. In *Northwest*, three separate contracts[151] were entered into between the seller and buyer. A dispute arose over the first contract and, therefore, the buyer refused to pay for the second contract. The seller cancelled shipment on the third contract because the buyer failed to pay for the second contract. The court held that a party may not refuse performance simply because the other party has breached a separate contract.[152]

In the instant case, the trial court found the contracts between Pioneer and UMIC to be separate contracts.[153] Accordingly, the Sixth Circuit applied the separate contract doctrine of *Northwest*. Pioneer was not warranted in refusing performance on the future contracts on the basis of UMIC's prior breach. Pioneer's letter of June 4[154] was an overt communication of an intention not to perform the June contract, constituting an anticipatory repudiation of the June contracts.[155]

As additional support for its decision, the Sixth Circuit asserted that the case of *National Farmers Organization v. Coast Trading Co.*,[156] was analogous to the present case. *National Farmers* in-

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its to Pioneer. "When performance is due . . . any failure to render it is a breach." FARNSWORTH, *supra* note 12, at 576.

149. 707 F.2d at 253.

150. 261 Or. 480, 495 P.2d 744 (1972). National Farmers Org. v. Coast Trading Co., 488 F. Supp. 944 (D. Or. 1977); National Farmers Org. v. Bartlett and Co. Grain, 560 F.2d 1350 (8th Cir. 1977).

151. The first contract involved the sale of plywood. The plywood was never delivered. The second contract concerned the sale of a carload of pine lumber. The plywood was not delivered, thus the buyer refused to pay for the pine lumber. The third contract involved a carload of "studs." The seller cancelled the shipment of the studs to the buyer because the buyer failed to pay for the pine lumber.

152. 261 Or. at 490, 495 P.2d at 750.

153. 707 F.2d at 253.

154. Pioneer's letter of June 4, 1980 stated they were under no obligation to deliver on the June contracts. 707 F.2d at 252-53.

155. The test of anticipatory repudiation in § 2-610 is an unequivocal, positive statement of an unwillingness to perform. *See* CALAMARI & PERRILLO, *supra* note 7, at 460; WHITE & SUMMERS, *supra* note 29, at 213-14.

156. 488 F. Supp. 944 (D. Or. 1977).

volved a series of contracts for the sale and purchase of grain. Both parties contended that they suspended performance because the other party either failed to deliver or make payments.[157] The district court in *National Farmers* cited *Northwest* as authority when it decided the issue of anticipatory repudiation on a contract by contract basis.[158] The *National Farmers* court held that even though the buyer withheld payment on some contracts, the seller still had a duty to perform on the future contracts.[159]

Other jurisdictions are in accord with the Sixth Circuit in holding that the breach of one contract does not excuse performance under another separate contract.[160] Nevertheless, commentators criticize adoption of the "separate contract doctrine" as an inflexible rule of law.[161] A primary criticism aimed at cases like *Northwest* is the imposition of a duty to demand adequate assurances on one of the parties but not the other. The buyer withholds payment, in essence a self-help remedy, while the seller is required to demand assurances.

> Surely the rule for which *Northwest Lumber* is to stand is not that if a party is clever enough to commit the first material breach, a duty of demanding adequate assurances will always be imposed on the other party, thereby destroying the right of the aggrieved party to terminate for material breach.[162]

As previously noted, the second issue on appeal was whether UMIC's actions constituted sufficient grounds to justify demand for adequate assurance of performance. The U.C.C. and Restatement procedures for demanding adequate assurance of performance are comparable but not identical.[163] The sections were designed as a lawyer's weapon to be used to prevent litigation.[164]

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157. *Id.* at 945-46.

158. *Id.* at 951-52.

159. *Id.* at 950.

160. *See, e.g.*, National Farmers Org. v. Bartlett & Co., 560 F.2d 1350 (8th Cir. 1977). For pre-U.C.C. cases see Twitchell v. Robertson Paper Co., 94 Vt. 473, 111 A.570 (1920); Rock v. Gaede, 111 Kan. 214, 207 P. 323, 27 A.L.R. 1152 (1922); Hanson & Parker v. Wittenberg, 205 Mass. 319, 91 N.E. 383 (1910).

161. 3 CORBIN ON CONTRACTS § 696 (1960); KAUFMAN, CORBIN ON CONTRACTS § 696 (1982 Supp., Part 1).

162. KAUFMAN, *supra* note 161, at 706.

163. For U.C.C. § 2-609 (1978), RESTATEMENT (SECOND) OF CONTRACTS § 251 (1979), and the article comparing them see WHITE, *supra* note 161, at 706.

164. WHITE, *supra* note 137, at 842-43, indicates that the provisions could be construed

U.C.C. section 2-609, applied in the instant case, assures both seller and buyer that their "expectation of receiving due performance will not be impaired."[165] Thus, once a party becomes insecure about the other party's performance, the party's expectation is impaired and that party may demand adequate assurance of performance.[166] Once demanded, failure to provide an adequate assurance within thirty days constitutes a repudiation of the contract.[167] In order for a demand for assurances to be effective, the party demanding the assurances must have commercially reasonable grounds for insecurity.[168]

In *UMIC*, neither Pioneer nor UMIC demanded adequate assurances of performance. However, the court does make it clear that Pioneer had no reasonable grounds for insecurity to resort to section 2-609 demands. Even though UMIC withheld $92,895.82, they did make the two million dollar payment on the settlement date. Thus, Pioneer simply had no grounds.

The result in *UMIC* may be contrasted with the Illinois Appellate Court decision in *Toppert v. Bunge Corp.*,[169] where the court held that a seller was justified in refusing to perform on future contracts where the buyer withheld payment on prior contracts. The cases may be distinguished on three bases: Toppert had reasonable grounds for insecurity; he demanded adequate assurance of performance; and Bunge's failure to respond to the seller's demand for adequate assurance constituted a repudiation.

For the practitioner to differentiate the cases and advise the client as to appropriate action is not as easy. Whether particular conduct constitutes a repudiation is frequently a debatable question. The instant case is illustrative. The trial court found UMIC's conduct a total repudiation of the contract. The Sixth Circuit ex-

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as such, but that his analysis of cases decided under the U.C.C. provision suggests that the sections are primarily a judge's weapon.

165. U.C.C. § 2-609(1)(1978).

166. WHITE & SUMMERS, *supra* note 29, at 208.

167. U.C.C. § 2-609(4)(1978) provides: "After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

168. U.C.C. § 2-609(2)(1978) provides that "[b]etween merchants the reasonbleness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards."

169. 60 Ill. App. 3d 607, 377 N.E.2d 324 (1978).

amined the same evidence and found no overt communication by UMIC not to perform, therefore, no repudiation. Advising a client that performance may be ceased, because the words or acts of the other party establish a repudiation, is an uncertain proposition.

Furthermore, demanding adequate assurance of performance does not always solve the problem of whether the questioned conduct is a repudiation. A justifiable demand for adequate assurance requires reasonable grounds for insecurity on the part of the demanding party. If a court determines that there is no ground for insecurity, failure to give assurance is not a repudiation, but may trigger conduct by the demanding party which constitutes a repudiation or breach. Additionally, what establishes adequate assurance to such a demand is not clear. Although not deemed satisfactory assurance by the client, once a party responds to the demand by giving oral or written assurances, the responding party's conduct cannot with certainty be treated as a repudiation. From a practical standpoint, the Code mechanism for demanding adequate assurance, intended as an innovation to deal with the dilemma of whether conduct is or is not a repudiation, does not assure allocation of responsibility for contract breach.